

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
Rules and Regulations Implementing)	CG Docket No. 02-278
the Telephone Consumer Protection)	
Act of 1991)	

**Comments of the National Consumer Law Center and the
National Association of Consumer Advocates**

Filed June 6, 2016

In response to the Commission’s request for comments on the Petition for Declaratory Ruling and Waiver filed by Kohll’s Pharmacy & Homecare Inc. (“Kohlls”),¹ the National Consumer Law Center² submits these comments on behalf of its low-income clients and the National Association of Consumer Advocates.³ In that Petition, Kohll’s seeks a ruling that the advertisement it faxed was not in fact an advertisement but was merely an informational message. It also asks the Commission to create a special exemption, similar to that for autodialed or prerecorded calls to cell phones that deliver “Health Care Messages,” for faxes that mention the health benefits of vaccinations.

The Petition should be denied. Facsimile advertisements shift advertising costs from the advertiser (in this case, Kohlls) to the recipient because it is the recipient who must pay for the printing costs (paper and toner). The Commission should not give Kohlls free rein to advertise its flu shot services via facsimile as this will result in real costs to the recipients, who likely have no interest whatsoever in seeing these ads, much less paying for them.

Most importantly, even if the Commission were to extend the “Health Care Message” exemption already in place for robocalls to facsimile transmissions, the particular facsimile sent by Kohlls at issue in this petition would not qualify for it because the fax is an advertisement, not a

¹ See http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0421/DA-16-436A1.pdf

² The **National Consumer Law Center (NCLC)** is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commission and publishes *Access to Utility Service* (5th edition, 2011) as well as NCLC’s *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*.

³ The National Association of Consumer Advocates (NACA) is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA’s members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

health care message. To treat the Kohl's fax, which promotes a service, states its price, and invites recipients to call for a quote, as something other than an advertisement would eviscerate the definition of "advertisement" and unleash a torrent of junk faxes. It would also render the prohibition of prerecorded calls to residential lines a dead letter, since the only substantial category of calls that is prohibited under the Commission's rule are those that "introduce an *advertisement* or constitute telemarketing." 47 C.F.R. § 64.1200(a)(3)(iii) (emphasis added). In addition, it would negate the extra protection (the requirement of prior express *written* consent) for robocalls to cell phones that introduce an advertisement (or constitute telemarketing)—a particularly important protection for consumers. 47 C.F.R. § 64.1200(a)(2).

The Facsimile is An Advertisement

Here is the facsimile at issue:

3/3/10 15:25 482-408-2414 HR Exec D 1/1

Corporate Flu Shots

Only \$16-\$20 per vaccination

Did you know....

10 employees sick from the flu costs you \$877.10

Each flu infection results in 3-5 missed work days and up to 2 weeks of low work productivity

How much is the flu REALLY costing your company?

Protect your assets! Vaccinate your employees.

Call for a free quote today

(877) 408-1990

www.MyWorkWellness.com

Providing corporate vaccinations for over 15 years

A division of Kohl's Pharmacy & Homecare...trusted since 1948

Removal From List Request

If you have received this information in error or if you are requesting that transmissions cease in the future, please notify the sender to be removed as the recipient of future transmissions. Notify the sender by sending a return transmission to (402) 895-7555, by calling (866) 500-7800, extension 154, or by sending an email to skurland@kohls.com.

The Commission's rules define "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1); *see also* 47 C.F.R. § 64.1200(f)(15) (exact same language in definition of "unsolicited advertisement").

The facsimile at issue here expressly advertises, in bold, the commercial availability of "corporate flu shots" at "only \$16-\$20 per vaccination." There is no serious question about whether this facsimile is an advertisement. Indeed, the Illinois Supreme Court has already held that this facsimile is an advertisement while ruling on the underlying action against Kohlls. *Ballard RN Center, Inc. v. Kohll's Pharmacy and Homecare, Inc.*, 48 N.E.3d 1060, 1062 (Ill. 2015), *reproduced as Petition Exhibit G* at p. 2, para 7 ("the fax advertises defendant's 'Corporate Flu Shots.'"); *see also id.* at 48 N.E.3d 1060, 1063, Exhibit G p.4, para 19 ("over 4,000 fax advertisements were sent"). Kohll's argument that the primary purpose of the facsimile is "informational" is disproved by the face of facsimile itself. The fact that the facsimile provides additional information does not negate that it is an advertisement. *See P&S Printing LLC v. Tubelite, Inc.*, 2015 U.S. Dist. LEXIS 93060, *9 (D. Conn. 2015) ("courts have found that to constitute an advertisement under the TCPA, the document does not need to make an "overt sales pitch" so long as it "promotes the commercial availability of the Defendant's goods or services . . . courts should consider whether the message . . . tends to propose a commercial transaction."); *Peter Strojnik, P.C. v. Signalife, Inc.*, 2009 WL 605411, at *5 (Mar. 9, 2009) (denying motion to dismiss; "While the facsimile does provide information about Signalife as a company, it also lists the share price of the stock and encourages readers to "GO TO YOUR FAVORITE FINANCIAL WEBSITE ... READ THE NEWS ON THIS STOCK NOW!!! RIGHT NOW!!!!" The facsimile goes on to entice the reader: "COULD THIS STOCK TRIPLE FROM HERE? WHAT WOULD YOU DO WITH ALL THOSE JUICY PROFITS? ?" It is hard to escape the conclusion that this facsimile is advertising Signalife stock."). *See also Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 492-493 (W.D. Mich. 2015) (fact question whether faxed invitation to dinner and seminar that included seller's logo and a picture of a product was an advertisement, even though it did not list prices, list sales outlets, or mention specific products).

The Commission Should not Create a Health Care Exemption for Facsimile Advertisements

Kohlls argues that the Commission should create a new exemption for "health care" related facsimile transmissions, modeled after the Commission's "Health Care Message" exemption for calls to residential telephone lines. The Commission should decline to do so for two reasons.

First, the Commission does not have the authority to create such an exemption. In its 2012 TCPA Order, the Commission noted that the TCPA provided it with the authority to create exemption for calls to residential lines that *do not* include advertisements. *In re Telephone Consumer Protection Act, Final Rule*, 27 FCC Rcd 1830, 1838, ¶ 60 (February 15, 2012) ("2012 TCPA Order"; *see also* 47 U.S.C. § 227(b)(2)(B) (providing exemption authority). Constrained by that authority, it chose to exempt "health care messages," which it viewed as being "intended to communicate health care related information *rather than* to offer property, goods, or services." *Id.* at ¶ 63, n. 195 ("Because these health care-related calls' intent and purpose concern consumers' health, not the purchase of a good or service, as required by the definition of advertisement, we believe that these calls are not advertisements.") But the TCPA does not provide equivalent exemption authority for facsimile transmissions. *See* 47 U.S.C. § 227(b)(2)(F) (providing exemption authority only for tax exempt non-profit organizations). Thus, the TCPA does not provide the commission with the authority to create the exemption that Kohll's seeks.

Second, true health care facsimiles would not be governed by the Commission's facsimile rules in the first place because the rules only regulate "unsolicited advertisement[s]." 47 C.F.R. § 64.1200(a)(4); 47 U.S.C. § 227(b)(1)(c). As the commission noted in its 2012 TCPA Order, any communications exempted by its "health care message" exemption, by definition, cannot be advertisements, because its exemption authority was limited to phone calls that did not include advertisements. *2012 TCPA Order* at ¶ 63, n. 195. The Commission recently reiterated this point its filing with the D.C. Circuit regarding the 2015 TCPA Order:

Rite Aid appears to believe that the exemption for calls to residential numbers covers calls unrelated to healthcare treatment. But the Commission was clear when adopting that exemption that it covers only calls "intended to communicate health care-related information rather than to offer property, goods, or services." *2012 TCPA Order* ¶ 63. Indeed, the Commission noted that its exemption authority allowed it to exempt calls to residential numbers *only* if the calls do not contain unsolicited advertisements. *Ibid.* (citing 47 U.S.C. § 227(b)(2)(B)(ii)(II)).

See Exhibit 1 - FCC Response Brief at p. 69.

Thus, there is no need to create a health care message exemption for facsimile transmissions because true health care facsimiles, by definition, are not advertisements, and are therefore not regulated by the Commission's rules.

The Facsimile is not a Health Care Message

Finally, even if the Commission were to extend its health care message exemption to facsimile transmissions, the facsimile at issue here would not qualify for it. The Commission's "health care" message exemption states that

no person or entity may . . . initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call . . . delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.
47 C.F.R. § 64.1200(a)(3).

HIPAA defines the term "health care": "Health Care means care, services, or supplies **related to the health of an individual**." 45 CFR § 160. 103 (emphasis added). The facsimile at issue here is not related to the health of any individual and therefore does not qualify for the exemption. *See HHS Final Rule, Standards for Privacy of Individually Identifiable Information*, 65 FR 82462, 82568 (December 28, 2000). As the Department of Health and Human Services ("HHS") held

We clarify that a manufacturer of supplies ***related to the health of a particular individual***, e.g., prosthetic devices, is a health care provider because the manufacturer is providing "health care" as defined in the rule . . . We do not intend that a manufacturer of supplies that are ***generic and not customized or otherwise specifically designed for particular individuals***, e.g., ace bandages for a hospital, is a health care provider. ***Such a manufacturer is not providing "health care" as defined in the rule*** and is therefore not a covered entity.
Id.

Similarly, a pharmaceutical manufacturer does not provide “health care” simply by manufacturing drugs, or even by “providing free samples” to doctors’ offices. *Id.* at 82569; *see also id.* at 82731 (“examples of such non-covered entities are public health agencies and pharmaceutical companies”). Thus, the heart of the “health care” definition is its focus on care given to a particular individual.

The facsimile at issue here, on the other hand, is a generic advertisement sent to a marketing list that Kohll’s had purchased from a third party marketing company. *Exhibit F to Petition at p. 11*, para 27 (“We purchased the list [of fax numbers] from Red Door Marketing.”). It does not come close to conveying a health care message focused on an individual and therefore does not qualify as a health care message.

Further, as the Commission repeatedly stated in its 2012 Order, the health care message exemption applies to communications that are “subject to HIPAA.” *2012 TCPA Order*, 27 FCC Rcd at 1852-1856 (“In those instances where the prerecorded health care-related call is not covered by HIPAA, as determined by HHS, restrictions imposed by the TCPA and our implementing rules will apply as the facts warrant.”). The facsimile at issue here is not subject to HIPAA.

The FCC “note[d] at the outset that HIPAA regulations cover all communications regarding protected health information and all means of communication regarding such information.” *Id.* at 1854, ¶ 61 (emphasis added); *id.* (“HIPAA protects individually identifiable health information . . .”) Thus, in the FCC’s view, the Health Care Message exemption only applies to calls that concern such protected health information. *Id.* at ¶ 63 (“health care-related calls to residential lines, when subject to HIPAA, . . . concern the consumers’ health.”) (emphasis).

Yet the facsimile at issue here does not concern any consumer’s protected health information. It is a generic, impersonal advertisement that was sent to a marketing list of corporations. It therefore would not qualify for the healthcare exemption even if the Commission were to extend it to facsimile transmissions.

Conclusion

For the reasons explained above, we respectfully request that the petition filed by Kohll’s Pharmacy be denied.

Respectfully submitted,

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